



# CUTTING A PATH

## EFFECTIVE WRITTEN ADVOCACY IN CRIMINAL DEFENSE

Hon. David Neil McCarty

with additional material by Victoria Lowery, Margaret Cupples, and Meta Copeland

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# OUR PREMISE

- That incorporating new approaches in your trial advocacy can further your zealous defense of a client.
- That by incorporating written advocacy into your trial advocacy you can shift the paradigms at trial **and** on appeal
- We will look at three defined areas: motions in limine, motions to suppress, and oral or written objections to certain jury instructions
- I'm not talking about you filing thirty pages briefs in your cases, but deploying thoughtful, succinct attacks via the written word
- To know how to do this better, we need to see how the Courts treat different errors on appeal.

## Defending a client doesn't end with a trial. But if you don't preserve an argument, your client's chances might.

- Many issues in criminal appeals end with the Court deploying the phrase “procedurally barred”
- Earlier this week, the COA had a case on just this point, finding the failure to object to a jury instruction at trial resulted in a procedural bar
- “This Court has held that when a defendant fails to object to a jury instruction at trial, the defendant is procedurally barred from challenging the instruction on appeal.”  
*McGilvary v. State*, 290 So. 3d 1273, 1280 (¶24) (Miss. Ct. App. 2020).
- The Mississippi Supreme Court “has held on numerous occasions that an offended party's failure to object to jury instructions at trial procedurally bars the issue on appeal.”  
*Jones v. State*, 776 So. 2d 643, 653 (¶35) (Miss. 2000)

# JUST ONE FILING CAN IMPACT AN APPEAL

- “The Appellant, Derrick Fisher, was tried and convicted of the capital rape of his eleven year-old niece.” *Fisher v. State*, 690 So. 2d 268, 269 (Miss. 1996)
- “Rhonda Fisher, the defendant's wife, testified that the sexual relationship between Fisher and his niece was brought to light when she found a note their niece had written to Fisher.”
- “Prior to trial, Fisher's attorney filed a Motion in Limine based on M.R.E. 504(b) to prohibit any marital communications that were to be confidential. The trial court denied the motion.”
- “We have held that a specific motion *in limine* overruled by the trial court will sufficiently preserve the error when no objection was made.”
- While one of the statements to his wife was in the presence of a third party, one “was a confidential statement to his wife that when admitted constituted prejudicial error. The error necessitates reversal and a new trial.”
- The Court actually amended the Rules of Evidence in the opinion  
... **all due to a SINGLE motion in limine**

**IN THE WORDS OF THE GREAT PHILSOPHER  
GEORGE T. HOLMES, ESQ.**

“Don’t worry about the mule, just load the wagon.”



# Your written work gives you the strongest chance to help your client.

From the Fifth Circuit's Practitioner's Guide:

- You will have greater success persuading the court to decide in your favor if you have an effective and carefully prepared brief.... [B]ecause fewer than 25% of briefed cases overall are given oral argument, **the brief may be your only chance** to argue your position. Briefs should be written so that you get your important contentions before the court.

Source: United States Court of Appeals for the Fifth Federal Circuit, *Practitioner's Guide* ("Practitioner's Guide") 47 (emphasis added), available at <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/documents/practitionersguide.pdf>



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## (Sidebar, think about how much your judges are reading).

Given that the COA workload was about 450 cases a year, judges and clerks are reading at least a principal brief and response brief, plus usually a reply brief. Even if these are only 20 pages per brief (which is pretty rare), that's give or take 18,000 pages a year (*plus* the opinions they have to read).





(Also, think about HOW we are all reading in 2021)

## The “F-Pattern”



**\*All the News  
That's Fit to Print\***

**LATE CITY EDITION**  
 Weather: Bbs, warm today; clear  
 tonight; sunny, pleasant tomorrow.  
 Temp. range: mid-60s today; Sunday  
 71-80. Temp. after: India yesterday  
 at Congress U.S. report on P. M.

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# Real-life examples of clean storytelling

## ***Bush v. Gore*, 531 U.S. 98 (2000)**

Governor Bush's brief:

- I. The Decision of the Florida Supreme Court Violates Article II of the Constitution.**

Vice President Gore's brief:

- I. Article II Provides no Basis to Override the Florida Supreme Court's Decision.**



# The headlines forecast the argument:

Gov. Bush:

## **I. The Decision of the Florida Supreme Court Violates Article II of the Constitution.**

- Key concepts are “decision,” “violates,” “Constitution.”
- Focus is on the Constitution, not the state electoral system
- Focus is on the court’s *decision*, not on Gore, the system, etc.

Vice President Gore:

## **I. Article II Provides no Basis to Override the Florida Supreme Court’s Decision.**

- Key concepts are “Constitution [Article II],” “does not affect,” “decision.”
- Pushes the Florida court to the end, de-emphasizing it
- Focus is on limited interpretation of Constitution, letting State system do its job.

# They also set up a narrative mismatch.

Gov. Bush:

**I. The Decision of the Florida Supreme Court Violates Article II of the Constitution.**

- This emphatic sentence tells you there is a problem and that it has to be fixed. It's active and attacking.

Vice President Gore:

**I. Article II Provides no Basis to Override the Florida Supreme Court's Decision.**

- This more passively constructed sentence is, by its nature, forced to defend. You end up with a style mismatch where unless you can *assure* your reader that there is no problem, you might be in trouble.



**The construction of a story can have a major  
impact on your argument.  
Which of these do you think is better?**

**The action of respondents in excluding minor petitioners from admission to Sousa Junior High School solely because of race or color and in refusing to permit adult petitioners to enroll their children in Sousa Junior High School solely because of race or color deprives petitioners of their liberty and property without due process of law in contravention of the Fifth Amendment of the Constitution of the United States.**

**The State of Kansas in affording opportunities for elementary education to its citizens has no power under the Constitution of the United States to impose racial restrictions and distinctions.**

From different briefs in *Brown v. Board of Ed. of Topeka, Kan.*, 347 U.S. 483 (1954).

# A recent example of clean storytelling

***In Re Initiative Measure 65, No 2020-IA-01199-SCT (Miss. 2021)***

Mayor Hawkins' brief:

- I. Initiative Measure No. 65 was unconstitutionally brought to the voters.**



Secretary Watson's brief:

- Four Congressional Districts Exist Under a Federal Injunction for Congressional Elections, but Five Congressional Districts Exist Under State Law and May be Used for Anything but Congressional Elections.**

Image from, somewhat astoundingly, *Brief of Petitioners Mayor Hawkins Butler and the City of Madison*, at p. 8, and I suppose, whatever *420Magazine.com* is (not accessed for this presentation)

## The State was forced into a *Bush v. Gore* mismatch.

Petitioner's brief:

- I. Initiative Measure No. 65 was unconstitutionally brought to the voters.**

This emphatic sentence tells you there is a problem and that it must be fixed. It's active and attacking.

If this story catches hold with the reader, then it *must* be fixed.

It doesn't try to do math, just uses the "u" word.

Respondent's brief:

- **Four Congressional Districts Exist Under a Federal Injunction for Congressional Elections, but Five Congressional Districts Exist Under State Law and May be Used for Anything but Congressional Elections.**

Just as in *Bush*, the respondent is forced into trying to assure the reader that there's no problem here—the "these aren't the droids you're looking for" approach.

It has to explain the math to assure the reader.

# Story can have a major impact on decisions. The way you frame facts and background matters.

Before you say “this is all new-fangled stuff,” let me reach back exactly 70 years ago. **Joe Morissette** was convicted of theft of Government property not longer after World War II. Namely, taking the casings from used test bombs and selling them for scrap. The appeal was about whether the jury was properly instructed on the intent element.

His lawyer went “full story,” and—always calling his client “Joe” in the brief—kicked it off this way:

When he was fifteen years old his father died. Shortly after his father passed away he went to the CC Camp because he had no other means of living. While he was at the CC Camp his mother died. Joe was working at the A. C. Spark Plug Factory when he went in the Army. He was honorably discharged from the United States Army in February, 1944, and went back to the A. C. Spark Plug Company to work.

He left the Spark Plug Company and went into the fruit market business. He also hauled Christmas trees from Northern Michigan every year. He had been buying junk off and on for three and a half, maybe four, years and went pretty near all over Michigan.

From the Brief of the Petitioner in *Morissette v. United States*, 342 U.S. 246 (1952), which can be accessed at 1951 WL 82297

## Let's break down what is going on in these 7 sentences.

First off, if you notice, *there is no law at all*. This is to the U.S. Supreme Court, but so far the lawyer is not talking about precedent or Joe's conviction—but about establishing him as a *person*. And while at first it may seem to ramble, each line is *heavily coded* to achieve one core goal.

- “When he was fifteen years old his father died.” *General human nature to feel a little sad at the loss of a parent, especially so young.*
- “Shortly after his father passed away he went to the CC Camp because he had no other means of living.”



*The “CC Camp” referred to would have been well known to the readers of the day. Starting in 1933, the Civilian Conservation Corps was a federal relief program for boys & young men. They built bridges, planted trees, created game sanctuaries, & much more. It was real work for those in need—like these CCC workers building a park in Virginia.*

*DNM's grandfather, Neil McCarty, also joined the CCC as a young man after the loss of his father.*



## Let's break down what is going on in these 7 sentences.

- “While he was at the CC Camp his mother died.” *Presumably still in his teens and has now lost both his parents.*
- “Joe was working at the A. C. Spark Plug Factory when he went in the Army.” *Codes as a hard worker and as a patriot, or again, as someone who just does what they need to do to get by.*
- “He was honorably discharged from the United States Army in February, 1944, and went back to the A. C. Spark Plug Company to work.” *Again, Joe seems to be all about work.*
- “He left the Spark Plug Company and went into the fruit market business,” and “also hauled Christmas trees from Northern Michigan every year,” while “[h]e had been buying junk off and on for three and a half, maybe four, years and went pretty near all over Michigan.” *At this point, Joe is well established as a person who will give his all to do a job.*

From the Brief of the Petitioner in *Morissette v. United States*, 342 U.S. 246 (1952), which can be accessed at 1951 WL 82297

# Based on this story, what can you presume about Joe?

- Did he get a raw deal in life?
- Has he worked hard to overcome it?
- Does any of this sound like a person who would steal Government property?

## Catch me if this seems familiar, but the Government is forced into a narrative mismatch to respond.

- First of all, there's none of this "Joe" nonsense. It's "the petitioner" in the response.
- "On or about December 2, 1948, at about 1:30 or 2:00 p.m. petitioner loaded the bomb casings on his truck and started from the farm toward Flint, Michigan, for the purpose of selling them."
- En route Joe was supposedly told by a person, "upon seeing the bomb casings in the truck," that "he was taking a chance, advised him to take [the bomb casings] back where he got them."
- "Petitioner admitted that he was familiar with the signs around the bombing range and knew, at the time of the taking, that the casings were on government property."
- According to the Government's brief, Joe also "admitted that he did not have permission to be on the bombing range or to take the casings but thought the casings had been 'thrown away' or 'abandoned.'"

From the Brief of the Government in *Morissette v. United States*, 342 U.S. 246 (1952)

## The Government does its best job of “reframing” Joe.

- Emphasizes his knowledge that what he did was wrong
- Emphasizes others knew what he was doing was wrong, too
- Emphasizes he admitted he was trespassing and had, at best, a shaky theory that the bomb casings were “thrown away”
- De-emphasizes the emotional appeal of his loss of parents and hard work ethic

## ***Morrisette v. United States, 342 U.S. 246 (1952)***

*This is long, but see how the Court begins its opinion by echoing arguments of defense counsel.*

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read 'Danger—Keep Out—Bombing Range.' Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles 'so that they will be out of the way.' They were not sacked or piled in any order but were dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morrisette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized \$84.

Morrisette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morrisette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he 'did unlawfully, wilfully and knowingly steal and convert' property of the United States of the value of \$84, in violation of [federal law].



## *Morrisette v. United States, 342 U.S. 246 (1952)*

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read 'Danger—Keep Out—Bombing Range.' Nevertheless, the range was known as good deer country and was extensively hunted.

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## *Morissette v. United States*, 342 U.S. 246 (1952)

- Without reading a single line of the rest of the opinion, can you guess whether the Court affirmed or reversed?
- Keep in mind the case is about whether the jury was properly instructed—a notoriously subtle and often technical field of law. Do the facts look like they're about that?
- Do you think the Court's opinion, by Justice Jackson, reflects the story pitched about the hardworking orphan "Joe," or the cavalier thief who was the unnamed "Petitioner"?
- This is one opinion where it is powerfully shown how stories matter.

## The modern use of story to communicate to the Court

The Defendant's (Appellant) version of the story:

On the morning of November 22, 2016, Khalil Brown (who was under the influence of drugs during the time he made his observations) procured a ride from Curtis Valentine and Mr. Valentine's girlfriend Katherine Martin from Battlefield Campground. The group stopped at John's Grocery on Highway 80 where Ms. Martin went in to purchase some cigars. When she returned to the car, Ms. Martin took a seat in the passenger seat, so Mr. Valentine could drive. When the group left the grocery store, Mr. Brown believed the car was traveling between 70-90 miles per hour while turning onto Mt. Alban Rd. As a result, Ms. Martin asked Mr. Valentine to stop the car.

## The modern use of story to communicate to the Court

The Mississippi Attorney General's (Appellee) version of the same story:

Around 11:00 A.M. on November 22, 2016, a gray Nissan Altima with three occupants entered the parking lot of John's Grocery in Vicksburg, Mississippi. Twenty-year-old Katie Martin exited the Nissan and entered the store. When Katie returned to the car, she sat in the front passenger seat, and Valentine took the driver's seat. Although Katie did not know it then, in a few short minutes, the decision to ride in the front passenger seat would cost Katie her life.

The Nissan sped away from John's Grocery "like a rocket," racing away even as Katie closed the passenger door. As described by the owner of John's Grocery, the Nissan's wheels "spun all the way out of the parking lot", the car moving so fast that it "went sideways" as it turned onto Mt. Alban Road. The car sped toward Mosley Gap Road.

# Sharpen Your Knife to Effectively Tell Your Story



# Cut the Clutter



- Unless dates are just key, avoid them.
- Replace unnecessary dates with phrases that convey a sense of time: “Shortly after,” “a week after the couple met,” “Some months before”
- Avoid “*in its response to the Motion*” and other long procedural descriptors. All the legalese just gluts your work

# Give Context in the Structure of Your Argument

- Track the Court's **likely questions**, not just the record and precedent.
- The architecture of your writing must be visible.
- Make the **logical structure** obvious and intuitive.
- Help readers work less; **connect the dots** for them, by finding good cases or record cites.
- Use **outlines** (visual structure is critical).
- If appropriate, use **numbered lists** and **bullet points**. Yes, it will feel weird. Just take a shot at it.

# How the Pros Do It

Here's how Justin Cook handled a dense block of facts in *Schlegel v. State*, No. 2018-214:

## July 9, 2015

Rexdale Henry is arrested and placed into a detox cell. (Exhib. S-14).

- At around 10:45 in the morning, Rexdale Henry was brought into the jail. (Tr. 184-85).
- Henry is placed into Detox 1 at approximately 11:11 (Tr. 185).
- Henry is uninjured and is not seen by any medical personnel. He is walking upright freely, and with straight posture. (Tr. 221).

## July 11, 2015

Two days later, Justyn Schlegel is arrested and placed in an isolation cell (Exhib. S-14, S-15).

- At 7:52 in the morning on July 11, Schlegel is booked in and placed into isolation. (Tr. 187-89).
- Later that morning, at approximately 9:36, Henry leaves Detox 1 to take a shower. (Tr. 193). There is no explanation as to why Henry was left in the Detox cell for 2 days. (Tr. 193).
- After showering, Henry ultimately leaves that area of the jail and is placed in the cell-block area with the other inmates. (Tr. 186, 193).
- Henry moves back in forth between blocks, spending time in the day rooms and cells. (Tr. 197-98).

## July 12, 2015

The following morning, jail staff moves Henry back into the detox cell. (Exhib. S-15).

- At 9:37 a.m. on July 12, Henry is again placed in Detox 1. (Tr. 198).

# Use Headings

- Use highly informative headings, preferably full sentences that amount to succinct propositions.
- You need headings, or bold assertions, typically **every one to three pages**.
- Nest your headings and subheadings (Russian Doll).
- Argue in the alternative.





**Questions?**

# Thank You!



**Judge David Neil McCarty**  
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